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CASE NO. 81-40

IN THE SUPREME COURT OF THE UNITED STATES
(October Term 1981)

CYNTHIA PROCTOR,

Petitioner,

vs.

PAUL KRAMER, M.D.,

Respondent.

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WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF

GARY L. WILKINS and LEO WOTITZKY
of WOTITZKY, WOTITZKY, MANDELL,
BATSEL & WILKINS
Charlotte Medical Plaza
Suite 204, 590 Harbor Boulevard
Port Charlotte, FL 33952
Telephone: (813)625-0700
Attorney for Petitioner

REPLY BRIEF OF PETITIONER

A. QUESTIONS PRESENTED FOR REVIEW.

Notwithstanding Respondent's statement to the contrary, the issue presented for review is simply whether an appellate scheme which precludes the resolution of conflicts emanating from different appellate courts within the same state, thus subjecting citizens within that state to differing interpretations of the same state law, denies equal protection and due process of law.

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C. TABLE OF AUTHORITIES

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D. JURISDICTIONAL GROUNDS:

The Respondent stated, without reference to any authority, that this Court does not have jurisdiction to consider the instant case because the decision sought to be reviewed was not a "final judgment" rendered by the highest court of the state in which a decision could be had. However, as succinctly stated in Gallick v. Baltimore & Ohio Railroad Company, 372 U.S. 108, 9 L. Ed. 2d 618, 83 S. Ct. 658 (1963), this Court does have jurisdiction to review this case since it does represent the final judgment of the State Courts.

In Gallick the Court of Appeals of Ohio reversed the verdict of a trial court and the Ohio Supreme Court refused further appellate review. This Court held that this refusal made the intermediate appellate court's decision the final judgment rendered by the state court so as to allow review of that case. Similarly, the refusal of the Florida Supreme Court in the instant case to grant further appellate review rendered the intermediate court's decision the

final judgment of a State Court; therefore, review is allowable by this Court.

E. ARGUMENT:

The Respondent has confused and misstated the nature and extent of the Florida Supreme Court's discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution as interpreted in Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). What the Respondent referred to as an exercise of discretionary jurisdiction is actually an arbitrary refusal to take jurisdiction. Discretion arises only in the event the district court of appeal sees fit to write an opinion.

The Florida Supreme Court in Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958), as the respondent correctly cites, set forth the policy of the Florida Supreme Court as that of preserving the uniformity of principle and practice in the State. To accomplish this purpose the scope of Florida Supreme Court review must not be limited in the manner implicit in the Jenkins interpretation of the Constitution.

The effect of such an interpretation is directly counter to the policy of having uniform law throughout the State. The real effect promotes different laws in the various districts of the State. The following example of the impact of the Jenkins interpretation of the Florida Constitution illustrates this effect.

In 1973 the Florida Supreme Court judicially adopted the doctrine of comparative negligence in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). Suppose a trial court reinstituted the doctrine of contributory negligence and on appeal the district court entered a per curiam opinion without a written majority opinion but with a dissenting opinion clearly pointing out the conflict with Hoffman. Under Jenkins the Florida Supreme Court would be unable to consider this decision. The effect of such a situation would be that in one district of the same state trial courts would follow the doctrine of contributory negligence while in all others comparative negligence would be the rule.

The instant case reflects an identical occurrence which, no doubt, happens frequently. As is apparent from the case sub judice and the Hoffman example, a real and embarassing conflict of opinions is inherent in the Jenkins interpretation of Article V, Section 3(b)(3) of the Florida Constitution. Also, counter to the Respondent's argument that there are no special or important reasons for this Court to grant review, the above example illustrates the widespread inequity and injustice that surely result from the Florida Supreme Court's decision in Jenkins. Such capricious results constitute special and important reasons for granting jurisdiction in this cause.

During the past few months the Florida Supreme Court has itself recognized the injustice inherent in the Jenkins interpretation of Article V, Section 3(b)(3) of the Florida Constitution. In Jollie v. State of Florida, 6 FLW 555, (Fla. 1981), the Florida Supreme Court partially receded from Jenkins, holding that,

> "a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction."

The Court admitted in Jollie that inequities were inherent in the interpretation of Article V, Section 3(b)(3).

> "We have no doubt that district court judges can produce one or more methodologies to preserve the review strictures of the 1980 amendment on the one hand, while on the other eliminating the possible injustice inherent in foreclosing review to some of several equally situated litigants." Id. at 556.

In fact, there is no methodology of which petitioner is aware that will eliminate the injustice which exists when some litigants are allowed review while others are not, merely because a district court chooses to write a majority opinion for one but not for another. Allowing the several district courts absolutely to preclude review by the Florida Supreme Court is fundamentally unsound. The only solution is the elimination of the prerequisite of a written

majority opinion for review, or, at the least, to allow review where a conflict is noted and made apparent in a dissenting opinion, as in the instant case. Thereby, all litigants facing conflicting district court decisions will, at least, have an equal opportunity to have the conflict resolved. Additionally, the Florida Supreme Court would not be in the position of fostering disparate rules of law in different districts of Florida.

For these reasons this Court should take jurisdiction and grant a Writ of Certiorari to the Florida Supreme Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner has been furnished, by United States Mail, to JOE N. UNGER, ESQUIRE, of the Law Offices of Joe N. Unger, P.A., 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130; K. SCOTT DWYER, ESQUIRE, of Preddy, Kutner & Hardy, P.A., 12th Floor, Concord Building, 16 West Flagler Street, Miami, Florida 33130; and JIM SMITH, ESQUIRE, Attorney General of Florida, The Capitol, Tallahassee, Florida 32301, this 25th day of August, 1981.

Gary L. Wilkins of
WOTITZKY, WOTITZKY, MANDELL,
BATSEL & WILKINS
Suite 204
590 Harbor Boulevard
Port Charlotte, Florida 33952
Attorneys for Petitioner
(813)625-0700